



ADVOCATES
FOR HIGHWAY
AND AUTO SAFETY

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**Qualification of Drivers; Exemption Applications; Vision
Notice of Applications for Exemption from the Vision Standard
65 Fed. Reg. 66286, November 3, 2000**

Introduction

Advocates for Highway and Auto Safety (Advocates) files these comments in response to the Federal Motor Carrier Safety Administration (FMCSA) notice of petitions and intent to grant applications for exemptions from the federal vision standard, title 49 Code of Federal Regulations (C.F.R.) § 391.41(b)(10). 65 Fed. Reg. 66286 *et seq.* (Nov. 3, 2000). Advocates does not comment on the merits of the individual applications or the specific qualifications of the 65 drivers except as necessary to exemplify problems in the quality and quantity of the information provided regarding the applications, the agency's presentation of the information to the public, and the process adopted by the agency for evaluating the petitions and for making determinations to grant the exemptions.

Advocates files these comments for several purposes. We comment in order to clarify the consistency of the exemption application information provided by FMCSA to the public; to object to the agency's misplaced reliance on conclusions drawn from the vision waiver program; to underscore the procedural inadequacy of this notice and previous, similar notices; to address the agency's misinterpretation of existing law regarding the statutory standard governing exemption determinations; and to place in the administrative record of this proceeding the pertinent portions of a ruling of the U.S. Supreme Court that directly bear on the legal validity of vision exemptions and the agency's exemption policy.

The Federal Motor Carrier Safety Improvement Act of 1999

More than 5,000 people are killed annually in commercial motor vehicle (CMV, or truck and bus) related crashes, and recent data show that the fatality total has remained steady over the last 5 years. In addition, many tens of thousands of motor carriers are unrated by the FMCSA and timely information about operator violation and conviction records is poor. A number of crashes involving motor coaches in recent years, as well as the issuance of a proposed change in

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the driver hours-of-service regulations, has heightened awareness regarding motor carrier and operator safety. In addition, Congress expressed its concern for safety on our nation's highways and specifically determined that there is a need for new leadership and oversight in the regulation and stewardship of commercial motor vehicle operations. Toward that end, Congress passed and the President signed the Motor Carrier Safety Improvement Act of 1999, Pub. L. 106-159, 113 Stat. 1748 (Dec. 9, 1999), which required the establishment of a new agency, the FMCSA, within the U.S. Department of Transportation.¹ That agency was formally established as of January 1, 2000. 65 Fed. Reg. 220 (Jan 4, 2000).

The Federal Motor Carrier Safety Improvement Act of 1999 (Safety Improvement Act or Act) was enacted in order to significantly enhance the oversight and safety of commercial motor vehicles. The Safety Improvement Act established the FMCSA as an agency which is devoted entirely to motor carrier safety. The premise of the Safety Improvement Act is that a new safety agency, with expanded resources and funding dedicated to the safety of commercial motor vehicle operations, could achieve the safety improvements intended by Congress, as well as fulfill the Year 2008 fatality reduction goal set by the Secretary of Transportation.

The Safety Improvement Act changed the fundamental manner in which federal authorities regulate motor carriers. Congress identified in the findings section of the Safety Improvement Act a list of major problems with the existing federal oversight of commercial vehicles that needed to be corrected. In order to implement these statutory findings and purposes, Congress explicitly enshrined safety as the new agency's mission and highest priority. The Safety Improvement Act states that the FMCSA "shall consider the assignment and maintenance of safety as the highest priority, recognizing the clear intent, encouragement, and dedication of Congress to the furtherance of the highest degree of safety in motor carrier transportation." Safety Improvement Act, Section 101(a). Not only is safety the agency's highest priority, it is the paramount goal which the agency is required to achieve in all of its actions and functions. This is not merely gratuitous rhetoric, but represents a clear mandate to the FMCSA to advance safety as its sole mission and to carry out actions and adopt policies which demonstrate the advancement of safety goals to the highest degree.

As a consequence of the unequivocal wording and clear meaning in the Act, the agency must justify each of its actions based on its measurable safety impact. In the Safety Improvement Act Congress set an overarching standard for motor carrier operations -- the highest degree of safety. Establishment of the FMCSA was intended to ensure that this pre-eminent standard of safety is achieved through agency policy choices and other actions. Thus, FMCSA is authorized to improve safety not merely to a greater extent than existed before, but to promote the "highest degree of safety in motor carrier transportation." *Id.* This means that safety must be the rationale for agency planning, analyses, and programs, and that the FMCSA

¹ Authority to carry out motor carrier functions was re-delegated to the Administrator of the Federal Motor Carrier Safety Administration, including exemption authority provided under 49 U.S.C. §§ 31315 and 31136(e).

must demonstrate that it is achieving the highest possible level of safety in its decisions and actions.

Motor Carrier Driver Qualifications Exemption Policy

In light of these events and other concerns about safety, Advocates opposes the policy of granting exemptions from the federal motor carrier safety regulations including the driver qualification standards. Rather than granting numerous individual exemptions, the agency should focus on scientific research that will establish whether current safety standards accurately measure the level of safety required to ensure safe motor carrier operations, and on research to develop a rational basis for conducting individualized testing. Granting exemptions based on inadequate surrogate criteria does not ensure that deviations from the motor carrier safety standards will provide equivalent or greater levels of safety. Moreover, piecemeal exemptions from otherwise credible and established standards will only serve to undermine the standard itself and increase the pressure to grant an increasing number and variety of exemptions, including exemptions from other safety standards. Unfortunately, FMCSA, and its predecessor agencies, have participated in this devaluation of the existing federal motor carrier safety standards (FMCSRs) by accepting “junk” science and non-scientific analysis as a valid substitute for the vision safety standard, and by placing the burden on the public to oppose granting these and other exemptions.

Notice of Applications for Exemption Determinations

In past notices of applications for exemptions, the FMCSA stated that it had reviewed the applications on the merits and had already made “preliminary” determinations to grant the exemptions. Advocates notes that no such statement appears in the preamble of the current notice. In numerous prior instances, Advocates has objected to the agency’s making such “preliminary” determinations on both substantive and procedural grounds. Advocates has also suggested appropriate procedures that the agency should follow.² Although the agency does not acknowledge this change in procedure in the preamble of the notice, Advocates is hopeful that this represents the elimination of the practice of making “preliminary” determinations on the merits of exemption applications prior to issuance of notice and the receipt of public comment. Such a change in agency procedure might indicate a new spirit of objective evaluation on the part of the agency.³

² See, e.g., comments of Advocates for Highway and Auto Safety submitted to DOT docket no. FMCSA-2000-7363, pp. 3-7 (“Exemption Determinations Made Prior To Public Notice and Comment”).

³ In a companion notice regarding the renewal of 9 current 2-year exemptions, however, the FMCSA has taken a different approach and again usurped the right to fair public comment prior to an agency determination by making the decisions to renew the exemptions effective prior to the receipt of public comment. 65 FR 66203 (Nov. 3, 2000).

Recent events have made it evident that the FMCSA's "preliminary" determinations were made based entirely on self-reported information from the applicants and before critical information regarding the driving records of each applicant was obtained. That information came to light only through subsequent notice to the public and to state departments of motor vehicles and state safety authorities. As a result, the agency has delayed granting exemptions to a number of applicants in those cases where information regarding the poor driving history of the applicant was submitted after the agency had already made its "preliminary" determination. For example, in the most recent exemption application dockets the agency had already made "preliminary" determinations to grant the applications of 61 individuals included in the initial public notice for DOT docket number FMCSA-2000-7006, but only 56 applications were actually granted -- five applications had to be delayed in light of new information obtained by the agency during the comment period. Notice of Final Disposition, 65 FR 57230 (Sept. 21, 2000) ("Subsequent to the publication of the preliminary determination, the agency received additional information from its check of these applicants' motor vehicle records, and we are evaluating that information."). In another docket, three applications had to be delayed for similar reasons out of the 63 applicants included in the initial public notice for DOT docket number FMCSA-2000-7165. Notice of Final Disposition, 65 FR 57234 (Sept. 21, 2000). From this it is clear that the agency's review on the merits, and its "preliminary" determinations to grant exemptions in a number of cases, was not based on a complete and thorough investigation of all the available facts and information. Even though the agency had represented that the three-year driving record of each applicant had been verified, additional information regarding their motor vehicle records, or other relevant information, had not been checked by the agency. As a result, the agency has had to delay granting the exemptions pending further review of those cases.⁴ These events only underscore the need for the agency to conduct a thorough and impartial investigation of each case prior to making any determination to grant or deny an exemption.

Thus, Advocates is hopeful that the present notice indicates that the FMCSA is revising its practice and procedures to eliminate "preliminary" determinations rendered before public notice and comment, and before state authorities have had the opportunity to supply information to the agency regarding the driving records of applicants. However, since the current notice does not expressly address the issue, Advocates is not certain whether the change in wording in this notice is an isolated event or a permanent change in practice, and whether it represents merely a superficial change for the sake of appearance or a more substantive revision of agency practice. Advocates awaits further explanation of the status of "Preliminary" determinations from the agency.

⁴ It appears that the "preliminary" determinations to grant exemptions prevents the FMCSA from reviewing the additional information it has received regarding the motor vehicle records of the eight applicants in a fair and impartial manner. We say this because the subsequent information is viewed by the agency only as a cause for "delay" in granting the exemptions, not as a basis for vacating the "preliminary" determinations and reconsidering the exemption applications *de novo* based on all facts and circumstances. Moreover, in announcing a "delay" in the determination the agency did not provide the public with the additional information or any opportunity to comment on the new information. Proceeding to a final determination without doing so would be unfair and illegal.

Driver Information Used in the Safety Determination

Lack of Safety Analysis

Advocates has reviewed the accompanying background information on each of the drivers as reported by FMCSA. The factual information presented on behalf of each applicant is sparse and no safety analyses are supplied. The agency has largely responded to our criticism that previous exemption notices provided inconsistent information and often presented subjective or selective information in a one-sided attempt to bolster exemption applications. Advocates acknowledges that, for the most part, the information provided in this notice is presented in a more organized and consistent fashion and largely in an even-handed manner. The more important issue, however, is the incomplete information, the reliance on self-reported information, and the lack of in-depth safety analysis which should accompany the agency's safety determinations. The information provided in the notice amounts only to a terse statement of a few highlights on behalf of each applicant without providing any in-depth analysis or careful scrutiny. Essentially, the information only reflects that each applicant has passed the screening stage for exemption criteria and meets the preconditions for consideration of the exemption application. The FMCSA presents these bits of information as if they constitute a safety analysis of the driver record, but no actual analysis has been performed by the agency.

Self-Reported Driving Experience

For each applicant, the FMCSA notice states the total miles they have driven (either annually or over their lifetimes), the number of years driving commercial vehicles, the type of vehicle, and the most recent three-year driving record. The public, however, is not advised whether the information presented is taken from the driver applications without outside verification, or whether the FMCSA has determined these figures are accurate by other means. For example, miles driven is reported for each driver either as an annual figure or as a total for the driver's lifetime. No insight is provided on how these figures were derived nor is any statement made about their reliability. If the driver mileage figures are self-reported, the FMCSA should inform the public on how the totals were arrived at and what documentation was submitted by each driver to verify the accuracy of the figures cited in the notice. If the total mileage is based on other sources, the FMCSA should describe the type and quality of information on which the mileage figures are based. A similar concern exists about the verification of the other information presented to the public as the basis for determining that granting the exemption will result in equal or greater safety. The FMCSA should disclose how it verified the information that formed the basis for its determinations.

In response to the above criticism raised by Advocates in a prior notice (FMCSA-2000-7006), the FMCSA has stated that only the last three years of driving experience is required under the criteria for an exemption (64 FR 57230, 57232 (Sept. 21, 2000) and, therefore, only the fact that the applicant has driven a commercial vehicle for the three years prior to the date of the application is actually verified by the agency. Nevertheless, the agency presentations on

behalf of the applicants report many years of driving experience that is self-reported by the applicant and is not verified by the agency. The agency should indicate in the public notice that such information is self-reported, has not been verified, and is not relied on by the agency in making its safety determination.

Likewise, the FMCSA has also stated that total miles driven is not a critical criterion and is, therefore, not verified. *Id.* at 57233. Nevertheless, the agency states that the total “[m]ileage is presented as an indication of overall experience with commercial motor vehicles.” *Id.* The agency is presenting self-reported information that it has not verified in order to persuade the public that its “preliminary” determination is accurate, even though the agency asserts that it does not rely on this information in making its safety determination.

Advocates maintains that the FMCSA’s reliance on, and presentation of, self-reported information regarding years of experience and total mileage driven is inappropriate for two reasons. First, as the agency readily admits, it has not verified the accuracy of the information it accepts as factual and presents to the public. Without independent verification such information, as is the case with all self-reported information, cannot be accepted as reliable for any purpose because it is subject to mistake, exaggeration, and falsehood. Second, because the agency provides no verification of accident and citation history prior to the three-year driving record immediately preceding the application, there is no way to ascertain whether the self-reported driving experience, even were it accurate, is an accurate indication of a good or poor driving history. The self-reporting of driving experience alone, when viewed in a vacuum, will always convey a generally good impression of an experienced driver since there is no accurate reporting of negative experience, *i.e.*, accidents and citations, for the same period of time and mileage. A report of ten years and one million miles of driving experience, standing alone, conveys an impression that the applicant has good overall experience, but that impression could be altered dramatically if it were also known that the applicant had amassed several accidents and citations during the first seven years of that experience. Thus, the FMCSA’s reliance and presentation of such one-sided, self-reported information “to give an overall indication of experience,” *id.*, is entirely inappropriate and prejudicial in making safety determinations because it may provide an incomplete picture of the applicant’s driving history, and because it is irrelevant, according to the agency, if the most recent three year driving record “is the critical focus relative to safe driving.” *Id.*

The agency cannot have it both ways. Either the prior driving history is part of the safety determination since it presents an indication of the applicant’s overall experience, in which case the agency must independently verify the self-reported information and provide comparable accident and citation histories to provide a fair and accurate summary of the experience, or the driving experience prior to the last three years is irrelevant and should not be considered by the agency in its decisionmaking process for any purpose and should not be presented to the public in agency notices.

Advocates continues to contend that the juxtaposition of presenting large total number of years of self-reported driving experience (10, 20, and 30 years), as well as a large total number of self-reported miles driven, alongside only the three-year verified driving history creates the misleading impression that all applicants have long safe driving histories when, in fact, this may not be true in certain instances. The clear implication to be drawn from this presentation is that each applicant had a safe driving record with no accidents, citations, or convictions prior to the last three years. The FMCSA has denied any intention of trying to convey such an interpretation. *Id.* However, the repeated presentation of the driving history information in this manner, regardless of the agency's intent, leaves the impression that each applicant has a record of experience prior to the last three years that is unblemished by an accident or citation. An impression the agency readily accepts as an indication of overall experience with commercial motor vehicles. The agency has taken no action nor made any statement that would deter readers from drawing this conclusion.

Moreover, recent experience with state submission of documented accidents and citations that pre-date the three year driving record raise serious concerns about the factual record on which the FMCSA relies in making its determinations to grant vision exemptions. First, the FMCSA should avail itself of state collected driving information including state records older than three-years. So long as driving records are verified as accurate by the state they are relevant and material to the safety determination. In reviewing exemption petitions, the agency should avail itself of all information that is germane to the driving record and safety of the applicants.⁵ The FMCSA should request driving histories over extended time intervals from states that retain driving records for more than three years, even if that requires states to search additional databases and archived files. At the very least, this would afford both the agency and the public a more complete and realistic basis for evaluating the information that the agency has stated gives an overall indication of experience.⁶ Second, the agency should not publish as fact self-reported information about driving records without authenticating accident and citation information. The agency should consider reporting only driving experience and mileage history for which the agency has obtained a state driving record or which can be verified. Advocates believes that the FMCSA should make every effort to assure the public that exemptions are only

⁵ In regard to the 8 exemption applications for which final determinations have been "delayed," *see* 65 FR 57230, and 65 FR 57234, the FMCSA gives no indication as to whether the additional information obtained in those cases, and which has prompted the delays, relates only to motor vehicle records for the three-year period immediately preceding the application, or to information relating to the driving experience of the applicants prior to the most recent three year period, or both.

⁶ We realize, however, that the FMCSA is reluctant, if not unwilling, to deny an exemption based on prior driving records submitted by state officials. For example, the California Department of Motor Vehicles submitted to the agency verified evidence that one applicant had been cited for driving on the wrong side of the road in 1995, 5 years prior to his exemption application, and also had been found to be the party most responsible for 2 accidents in 1995 and 1996, 5 and 4 years prior to his exemption application. Although the agency did not deny or rebut these facts it treated them as ancient history and granted the exemption citing the past accident history as a positive sign of improved safety in the three years immediately preceding the exemption application. 65 FR 57232.

granted to those drivers with a verified safe driving history of at least five to ten years, not just the most recent three-year period.

The self-reported figure of the total miles driven by each applicant is either stated as a single total for the applicant's entire driving career, or as an annual figure which is intended to be multiplied by the number of years of self-reported driving experience claimed by the applicant. As a result, the FMCSA provides no reliable driving (mileage) exposure data for the last three years covered by the official driving record of each applicant. (Unless it is claimed that the applicants actually drove an equal number of miles each and every year). The agency has dismissed the need for annual exposure data in stating that whether an applicant accumulated accidents and citations under low or high mileage exposure during the critical three year period is "not relevant to the determination of the driver's acceptability." 65 FR 57233.

While Advocates understands that the agency has adopted a strict number of at-fault accidents or serious citations that must appear on the applicant's record in the last three years as its bright line for the safety determination, Advocates believes that, based on information published in the record, the agency should consider a sliding scale standard for drivers with little driving experience. Advocates has observed that while many applicants self-report extensive experience, a number of applicants report only three or four years driving experience with a limited number of miles driven. For applicants reporting relatively low accumulations of mileage and years of experience, but who nevertheless have accidents or citations on their record, exposure should be a factor in making the safety determination. Applicants with less accumulated experience should not be given the same level of leeway as applicants with longer experience. We base this view on two factors. First, exposure, rather than a predetermined number of accidents or events, is frequently used as an appropriate means of determining safety. In this regard we point out that in other contexts the FMCSA often relies on the fatality rate, rather than on the total number of annual fatalities, as an accurate measure of safety progress in truck-related crashes. Second, the agency has consistently stated that drivers with substandard vision in one eye can adjust over a period of time and, presumably, driving experience. Thus, the agency continually relates the age at which an applicant's impairment occurred implying that the earlier it took place the more time the applicant has had to adjust. It is not, therefore, unreasonable to expect that applicants with limited time and travel exposure may not be qualified for an exemption or should be disqualified at a lower level of accidents/citations. In light of these considerations, the agency should set a minimum mileage limit below which an

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Advocates does not concur with the FMCSA's view that requiring some drivers to submit three year records and other drivers to submit longer records is necessarily arbitrary and capricious. 65 FR 57233. Where state laws vary, and certain states maintain records for longer periods of time, the agency can rely on those laws. Regardless, the agency should assist all states in maintaining these critical safety records for periods of at least five and up to ten years.

applicant cannot obtain an exemption, and a descending scale based on exposure for accident and citation accumulation.

The FMCSA has argued that “[d]efining a required minimum mileage for application would enact a spurious screening standard.” *Id.* Nevertheless, the agency clearly believes that the number of miles driven has value as a measure of safety. “It is part of the basis for establishing whether a program has achieved ‘a level of safety that is equivalent to, or greater than, the level of safety that would have been achieved’ absent the exemption.” *Id.* This, however, is precisely the determination the agency is required to make for each exemption application. Thus, it is no small coincidence that the agency publishes the self-reported total mileage for all applicants and considers total mileage to “give an overall indication of experience.” *Id.* For this very reason, the agency should require applicants to meet a minimum total or average annual mileage, at least for the prior three years, as one of the qualifying criterion for an exemption, just as it requires a minimum of three years driving experience. We note in this regard that the self-reported mileage driven by the applicants varies widely, from as little as 48,000 total miles (#22) to a reported total of 4 million miles (#54) driving experience.

⁸ The FMCSA would be required to verify self-reports of driving mileage and years of experience. Not only should FMCSA attempt to ascertain mileage driven for the last three years, the pertinent period for which the agency checks state driving records, but the agency should also evaluate whether the criteria used in the exemption program is applicable for predicting future safety records based on low cumulative mileage totals over that three year period.

⁹ A number of applicants have accumulated a low number of years driven and may also have either low total career mileage, low annual average of miles driven. For examples see chart below.

Applicant Number	Career Miles Reported	Driving Years Reported	Annual Average Miles
8	63,000	3	21,000
11	300,000	3	100,000
19	360,000	3	120,000
22	48,000	4	12,000
37	324,000	3	108,000
38	100,000	4	25,000
42	135,000	5	27,000
56	158,000	5	31,600
58	156,000	6 (or 12)	26,000 (or 13,000)
62	567,000	4.5	126,000

Other Conditions Affecting Safety

Advocates has also argued that the FMCSA has made no effort to scrutinize the conditions under which the applicants have obtained their self-reported driving experience. There is no analysis of the percentage of total miles driven daytime versus nighttime, intrastate versus interstate, or long haul versus short haul. Further, the FMCSA has not made any attempt to distinguish between the kinds of driving routine the applicants experienced based on the type of driving they have done. In its proposed rule on driver rest and sleep for safe operations, 65 Fed. Reg. 25540 *et seq.* (May 2, 2000), the agency distinguishes between five types of drivers and driving regimes based on the type of vehicle driven and work performed: long haul; regional; local-split shift; local; and work vehicle. In response the FMCSA dismisses the conditions under which applicants obtained their driving experience as irrelevant. Although the agency now provides a break down of applicant driving history by certain types of vehicles -- straight truck, combination, and bus -- where such self-reported information is available, it has not attempted any analysis of whether one type of experience has greater predictive value for safety than another.¹⁰ Neither does the agency engage in such analysis as between prior driving experience in intrastate operations as opposed to interstate operations. The agency simply dismisses the need for further analysis by stating that it "has not assessed the relative value in terms of driving experience between driving these [] types of vehicle configurations." 65 FR 57233.¹¹ This, and other failures to provide safety analyses based on specific driving experience and conditions, indicates that the exemption process is not based on a credible, scientific evaluation of individual driving experience but is instead a broad-brush uncritical enterprise aimed at awarding as many exemptions as possible.

The FMCSA continues to emphasize, as it should, that most exemption applicants do not have an accident or citation (however, only in a commercial vehicle) in the prior three years. In this notice the agency reports that 12 of the 65 applicants have either accidents or citations on their driving records within the last three years. In a few instances, the violations are serious offenses. The agency does make an attempt in several instances to defend the individual applicant by describing the crash circumstances in terms that minimize the culpability of the applicant. Although Advocates acknowledges that the agency has shown greater restraint in this notice, than in prior notices, in how it characterizes the facts, the agency should nevertheless

¹⁰ FMCSA gives no insight as to how it evaluates and compares the different driving conditions under which applicants obtained their experience. For example, applicant number 22 has reported 3 years and 48,000 miles of driving experience, an annual average of 12,000 miles, exclusively in straight trucks presumably engaged in local delivery, while applicant number 8 has reported 3 years and 63,000 miles of driving experience, an annual average of 21,000 miles, exclusively in tractor-trailers and presumably in regional or long-haul delivery.

¹¹ Yet the FMCSA has reacted positively to protests by the motor coach industry that the agency failed to accurately differentiate the enormous differences in risk and in crash experience between buses and freight trucks in proposing the May 2000 hours of service amendments by indicating in both the agency's public meetings and later Roundtable discussion that it will differentiate motor coach hours of service requirements from truck drivers in any subsequent new proposal.

refrain from engaging in such unilateral defenses unless it is prepared to provide the full factual record of the incident. It is inappropriate and prejudicial for FMCSA to proffer the applicant's version of events, or to provide selective information from documents not in the public record, in an effort to bolster the application when the underlying information and documents are not available to the public and not part of the public record.¹²

Statements of Ophthalmologists and Optometrists

Advocates continues to advance its objection with regard to the FMCSA's reliance on personal statements from ophthalmologists or optometrists as to the applicant's ability to safely operate a commercial motor vehicle. While these specialists may be able to provide information regarding visual capabilities and pathology of the applicant, they are not experts on the driving task and are probably unfamiliar with the requirements for safe operation of commercial motor vehicles. They also are not the health care providers charged with overall commercial driver medical certification. This is particularly true in light of the fact that the vision standard requires better vision than any of the applicants possess and better vision than required by most states for passenger vehicle operation licensure. Moreover, none of these statements indicates that the ophthalmologists or optometrists are familiar with the types of vehicles that are driven by the applicants or the conditions under which their patients actually operate a commercial vehicle including annual driving mileage, amount of time spent loading vehicles and waiting for loads, amount of nighttime driving performed, weather conditions, over-the-road sleeping conditions (cab berths, motels), etc. None of these specific conditions are taken into account in the statements that are provided to the public. Moreover, the ophthalmologists or optometrists conducting the exams may have no prior familiarity with the patient. While such professionals can attest to a patient's level of visual acuity, they cannot be relied on for the proposition that the applicant has sufficient vision to perform the task of operating a commercial motor vehicle. Beyond stating that the applicants have been examined and have the requisite medical certificate, these statements regarding applicant qualifications to drive a CMV are immaterial. The agency, however, uses the statements of the ophthalmologists and optometrists not just to establish the degree of the applicant's visual acuity, but as testimonials to support the overall inference that the applicant is a safe driver. While the doctors are experts on vision, they are not experts on driving ability and motor carrier operations, and so their opinions on those issues are not persuasive, should not be relied on by the agency, and should not be quoted and recited as fact in the agency's public notice.

Misplaced Reliance on the Vision Waiver Program

The FMCSA's Notice of Petitions and Intent to Grant Applications for Exemption, in concluding that the 65 applicant's petitions for exemptions should be granted, relies in part on the

¹² While the FMCSA has tempered past efforts to defend the accident records of exemption applicants, the agency's continued reliance on facts and information that are not part of the record constitutes a violation of procedural due process and is at odds with fundamental rules of informal rulemaking.

results obtained from the ill-conceived and illegal vision waiver program. In past notices the agency has repeatedly asserted that “[t]he [] applicants have qualifications similar to those possessed by the drivers in the waiver program.” 65 Fed. Reg. 45824. The agency has also asserted that “[w]e believe that we can properly apply the principle to monocular drivers because the data from the vision waiver program clearly demonstrate the driving performance of monocular drivers in the program is better than that of all CMV drivers collectively.” *Id.* Advocates rejects this use of information collected from the now-defunct vision waiver program. We also disagree with the agency’s oft-stated conclusion “*that other monocular drivers, with qualifications similar to those required by the waiver program, can also adapt to their vision deficiency and operate safely.*” *Id.* (emphasis added). No such conclusion is tenable since the vision waiver program did not use a valid research model nor did it produce results that could legitimately be applied to any drivers other than those participating in the original vision waiver program.

Indeed, FMCSA was strongly criticized by a number of independent researchers and research organizations for ignoring basic principles of scientific methodology in its conduct of the vision waiver program. In the wake of the federal court decision that invalidated the vision waiver program, *Advocates for Highway and Auto Safety v. Federal Highway Administration*, 28 F. 3d 1288 (D.C. Cir. 1994), the agency admitted the inadequacy of the study methodology and design. “The FHWA [now FMCSA] recognizes that there were weaknesses in the waiver study design and believes that the waiver study has not produced, by itself, sufficient evidence upon which to develop new vision and diabetes standards.” 61 Fed. Reg. 13338, 13340 (Mar. 26, 1996).¹³ The agency cannot have it both ways -- it cannot claim an invalidated and incomplete waiver program as a source for scientifically credible principles for application to the current exemption process.

Most importantly, it is potentially improper and anomalous for the agency to attempt to apply facile generalizations about monocular driver capabilities to a case-by-case evaluation of each exemption applicant. This attempt contradicts the basic premise of the exemption evaluation and of reviewing each applicant’s case virtually *sui generis* and on the unique merits of the facts and circumstances which may qualify or disqualify any given applicant. In fact, the information collected in the vision waiver program is worthless as scientific data, and conclusions regarding the safety of any other individual driver or group of drivers who did not participate in the vision waiver program are neither credible nor scientifically valid. The agency cannot extrapolate from the experience of drivers in the vision waiver program to other vision impaired drivers who did not participate in that program. This point was made repeatedly to the FHWA in comments to the numerous dockets spawned by the agency’s determination to grant vision waivers. It was made quite clear at the time the agency undertook to grant waivers to drivers in the vision waiver program that the individualized information accumulated in that

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See also Qualification of Drivers; Vision Deficiencies; Waivers -- Notice of Final Determination and change in research plan, 59 Fed. Reg. 59386, 59389 (Nov. 17, 1994) (“The agency believes that the observations made by the Advocates, the ATA, the IIHS and others regarding flaws in the current research method have merit”).

program could not be used to serve any other purpose. Information collected in that program has been comprehensively repudiated as a basis for drawing any conclusions about non-participant drivers. The FMCSA, therefore, is obligated to re-evaluate the merits, and reconsider its preliminary determination to grant exemption petitions without any reliance on, or reference to, the experience of the drivers who participated in the vision waiver program.

Moreover, the agency asserts that drivers who do not meet the existing vision standard requirements can “adapt to their vision deficiency and operate safely.” *Id.* Yet the FMCSA provides no basis on which to assert that drivers in the original Vision Waiver Program adapted to their vision deficiency or how this was accomplished. More important to the current circumstance, however, is the fact that no evidence of such adaption is presented by or on behalf any applicant for exemption. Proof of this adaptive practice or behavior is crucial to the agency’s argument and safety determination, yet none is presented.

Interpretation of Statutory Standard for Granting Exemptions

In previous notices of final disposition of exemption requests, OMCS granted all the exemption requests that also had been granted preliminarily (with one exception referenced in footnote 8, pages 10-11, *supra*). In doing so, OMCS asserted that it was afforded more flexibility to grant exemptions under current law than it had under prior law. *64 Fed. Reg.* 66964; *see also* *64 Fed. Reg.* 27025 (May 18, 1999); *63 Fed. Reg.* 67600 (Dec. 8, 1998).¹⁴ The FMCSA appears to have adopted this same defective line of argument. Advocates disagrees with the agency’s view on this issue and its interpretation of the controlling law.

The current law on exemptions permits granting an exemption if that exemption “would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption.” 49 U.S.C. § 31315(b)(1). The FMCSA, as OMCS and FHWA before it, believes that Congress “changed the statutory standard to give the agency greater discretion to consider exemptions.” *64 Fed. Reg.* 27025 (1999). Indeed, the agency interprets the term “equivalent” to allow for a “more equitable resolution of such matters.” *Id.*

¹⁴ See comments filed by Advocates for Highway and Auto Safety to DOT Docket Nos FHWA-99-5473 (filed June 17, 1999), and FHWA-98-4145 (filed Feb. 8, 1999), respectively.

¹⁵ For example, the FMCSA recently stated that:
[a]ccording to the legislative history, the Congress changed the statutory standard to give the agency greater discretion to consider exemptions. The previous standard was judicially construed as requiring an advance determination that absolutely no reduction in safety would result from an exemption. The Congress revised the standard to require that an ‘equivalent’ level of safety be achieved by the exemption, which would allow for more equitable resolution of such matters, while ensuring safety standards are maintained.

Federal Motor Carrier Safety Regulations; Technical Amendments, final rule, *65 Fed. Reg.* 25285, 25286 (May 1, 2000). As we show in this section of the comments, the agency’s conclusion is spurious and at odds with the express meaning of the statutory language.

See also Federal Motor Carrier Safety Regulations; Technical Amendments, final rule, 65 Fed. Reg. 25285 (May 1, 2000). There is no basis in fact or law for this view.

The level of safety required in order for the Secretary of Transportation to grant waivers and exemptions is governed by the statutory language contained in section 4007 of the Transportation Equity Act for the 21st Century (TEA-21), Pub. L. 105-178, 112 Stat. 107 (1998) (codified at 49 U.S.C. § 31315). The statute requires that the Secretary, prior to issuing waivers and exemptions, determine whether granting a waiver or exemption "is likely to achieve a level of safety *that is equivalent to or greater than*, the level of safety that would have been achieved" absent the waiver or exemption. 49 U.S.C. § 31315 (a) & (b)(1) (emphasis added).¹⁶ By its express terms, the law requires the Secretary, based on evidence in the record, to find that any waiver or exemption will not reduce safety, but will achieve a safety result that is equal to or greater than the level of safety that would have been experienced had the waiver or exemption not been granted. But no such evidence is presented by the agency for the record, only unsupported conclusory generalizations.

This statutory language of equivalent or greater safety sets a very high standard that is no less stringent than the previous statutory standard which required that waivers be consistent with safety. *See* 49 U.S.C. § 31136(e) (1997). The standard of safety in section 31315 (a) & (b) is not a lower or more flexible standard than the prior legislative mandate that waivers must be "consistent with . . . the safe operation of commercial motor vehicles."¹⁷ The express wording of section 31315 requires a degree or level of safety that is at least equal to the degree or level of safety that existed prior to the granting of the waiver or exemption, *i.e.*, no reduction in safety is countenanced. Any attempt to gloss the standard of safety established in section 31315 as a less demanding safety standard than the prior waiver standard is a misinterpretation of the unambiguously clear statutory language.

The FMCSA appears to endorse the position of OMCS that under the TEA-21 wording exemptions are to be considered "slightly more lenient than the previous law." 64 Fed. Reg. 66964. OMCS relied on arguments previously made by FHWA which, in turn, cited legislative history addressing section 31315 to assert that "Congress changed the statutory standard to give the agency greater discretion to consider exemptions." 64 Fed. Reg. 27025. According to the agency's reasoning, requiring that an "'equivalent' level of safety be achieved by the exemption, [] would allow for more equitable resolution of such matters, while ensuring safety standards are maintained." *Id.*, citing H.R. Conf. Rep. No. 105-550, 105th Cong., 2d Sess. 489 (1998). This legislative history asserts that "[t]o deal with the [court's] decision, this section substitutes the term 'equivalent' to describe a reasonable expectation that safety will not be compromised."

¹⁶ In order to grant a waiver the Secretary must also find that it is in the public interest. 49 U.S.C. § 31315(a).

¹⁷ Indeed, the language of the prior waiver provision, that a waiver must be "consistent with the public interest and the safe operation of commercial motor vehicles," (49 U.S.C. § 31136(e) (1997)), provides a less strict safety standard than the current statutory terminology.

Id. Neither these statements by FHWA, nor the cited legislative history, support the interpretation that section 31315 reflects a lower or more flexible standard of safety.

The plain meaning of the statutory language is unambiguous. The statutory standard, that an “exemption would likely *achieve a level of safety that is equivalent to, or greater than, the level of safety that would be obtained in the absence of the waiver,*” requires no elucidation. 31315(b)(1) (emphasis added). The term ‘equivalent’ indicates a condition which is “equal in force, amount, or value” and is “corresponding or virtually identical esp. in effect or function.”¹⁸ Nothing whatever in the use of the word ‘equivalent’ in section 31315, as a substitute for the expression ‘consistent with’ used in the prior statutory provision, connotes or implies any increased flexibility, diminution, or other abridgement of the enacted safety standard for granting and administering waivers and exemptions. OMCS’ contention that lowering the standard for granting waivers (exemptions) was “unquestionably the intention of Congress in drafting section 4007,” 64 Fed. Reg. 66964, is a contention that is in conflict with the express language and wording of the statute. Where Congress has addressed the issue in clear and unambiguous terms that ends the inquiry. See *Chevron U.S.A., Inc., v. N.R.D.C.*, 467 U.S. 837 (1984).

Even if the standard set forth in section 31315 were not clear and unambiguous, reliance on the legislative history in this instance is unavailing. First, the statute makes no reference to providing a more flexible safety standard than had existed in the past. While “legislative history may give meaning to ambiguous statutory provisions, courts have no authority to *enforce* alleged principles gleaned *solely* from legislative history that has no statutory reference point.” *International Brotherhood of Electrical Workers, Local Union No. 474, AFL-CIO, v. N.L.R.B.*, 814 F.2d 697, 699 (D.C. Cir. 1987) (emphasis in original). Second, the cited legislative history relied on by in the past by OMCS and FHWA is taken from the Senate amendment to the original House bill, but was not restated in the Conference substitute adopted with enactment of TEA-21. As such, it is both a matter of pragmatic fact and legal precedent that this statement of one committee in one house of Congress, which was not adopted by the Conference Committee, is not the governing legislative history accompanying the law.¹⁹ See H.R. Conf. Rep. 105-550 at 490-91. Indeed, the Conference legislative history makes no mention of granting greater discretion to the Secretary to grant waivers and exemptions nor does it reflect any intent to overturn a judicial decision. Therefore, the legislative history relied on by the agency is not authoritative. Moreover, to the extent that the legislative history openly conflicts with and contradicts the will and purpose of Congress as clearly expressed in the statute, the legislative

¹⁸ See Webster’s New Collegiate Dictionary (1971).

¹⁹ It is evident from an examination of the wording of section 31315, when compared with the Senate amendment, that the Senate report language is inapplicable. The scope of the Senate amendment did not extend to exemption applications by individuals, but was “limited to a class of persons, vehicles or circumstances.” H.R. Conf. Rep. 105-550 at 490. The statute as enacted, however, allows for exemptions to be granted to “a person or a class of persons.” 49 U.S.C. § 31315(b)(1). The Senate amendment was never intended to apply to individual petitioners. Since Congress did not adopt the Senate amendment, it cannot have adopted, through silence, an interpretation contained in a legislative report that accompanied an amendment which was never enacted into law.

history carries no legal weight or analytic value whatever. Finally, according to the legislative history relied on by the FMCSA's predecessor agencies for their reasoning, the term 'equivalent' was selected by Congress for exactly the contrary purpose espoused by the agency, viz., to provide "a reasonable expectation *that safety will not be compromised*." H.R. Conf. Rep. 105-550 at 489 (emphasis added).²⁰ Thus, reliance on the appropriate conference report language actually bolsters the clear and unambiguous meaning of the statute that no decrease in safety is contemplated.

Supreme Court Decision on Vision Waivers

In *Albertsons, Inc. v. Kirkingburg*, No. 98-591 (June 23, 1999), the U.S. Supreme Court specifically rejected vision waivers as a regulatory modification of the vision standard in the Federal Motor Carrier Safety Regulations (FMCSRs). "[W]e think it was error to read the regulations establishing the waiver program as modifying the content of the basic visual acuity standard. . . ." *Albertsons*, slip op. at 15. The Court refuted the view that "the regulatory provisions for the waiver program had to be treated as being on par with the basic visual acuity regulation, as if the general rule [vision standard] had been modified by some different safety standard made applicable by grant of a waiver." *Id.* The Court reached this opinion based on the FHWA's own assertion that it had no facts on which to base a revised visual acuity standard either before or after the vision waiver program. "The FHWA in fact made it clear that it had no evidentiary basis for concluding that the pre-existing standards could be lowered consistently with public safety." *Id.* at 19. According to the Court, "there was not only no change in the unconditional acuity standards, but no indication even that the FHWA then had a basis in fact to believe anything more lenient would be consistent with public safety as a general matter." *Id.*

In making these statements and reaching its conclusion, the Supreme Court relied heavily on the administrative record compiled and the decision of the Court of Appeals rendered in *Advocates for Highway Safety v. FHWA*, 28 F.3d 1288 (CA DC 1994). The Supreme Court summed up the agency's basis for the Vision Waiver Program as follows:

[T]he regulatory record made it plain that the waiver regulation did not rest on any final, factual conclusion that the waiver scheme would be conducive to public safety in the manner of the general acuity standards and did not purport to modify the substantive content of the general acuity regulation in any way. The waiver program *was simply an experiment with safety*, however well intended, resting on a hypothesis whose confirmation or refutation in practice would provide a factual basis for reconsidering the existing standards.

²⁰ In fact, the rigorous controls of section 31315 are a paradigm shift in the level of procedural adequacy required to be observed by FMCSA in reviewing the legitimacy of and for awarding waivers and exemptions.

²¹ The Court was adjudicating the issuance of a waiver pursuant to 49 U.S.C. § 31136(e), which has since been transmuted into exemptions under 49 U.S.C. § 31315.

Albertsons, slip op. at 20 (emphasis added) (citation omitted).

Indeed, although the *Advocates* case was not before it, the Supreme Court went out of its way to endorse the decision reached by the Court of Appeals, noting that it was “hardly surprising that . . . the waiver regulations were struck down for failure of the FHWA to support its formulaic finding of consistency with public safety. See *Advocates for Highway Safety v. FHWA*, 28 F.3d 1288, 1289 (CA DC 1994).” *Id.*, at note 21. The Court went on to emphasize that the agency has tried to have things both ways.

It has said publicly, based on reviews of the data collected from the waiver program itself, that the drivers who obtained such waivers have performed better as a class than those who satisfied the regulation. [Citations omitted]. It has also noted that its medical panel has recommended ‘leaving the visual acuity standard unchanged,’ see 64 Fed. Reg. 16518 (1999) [citations omitted], a recommendation which the FHWA has concluded supports its ‘view that the present standard is reasonable and necessary as a general standard to ensure highway safety.’ 64 Fed. Reg. 16518 (1999).

Id.

The Supreme Court concluded that employers do not have the burden of defending their reliance on existing safety standards in the FMCSRs in the face of FHWA waivers. According to the Court, were it otherwise,

[t]he employer would be required in effect to justify *de novo* an existing and otherwise applicable safety regulation issued by the Government itself. The employer would be required on a case-by-case basis to reinvent the Government’s own wheel when the Government merely had begun an experiment to provide data to consider changing the underlying specifications.

Id. at 22.

It is clear from the Supreme Court’s opinion that whatever validity the Vision Waiver Program may have had (and *Advocates* does not concede that it ever had any scientific validity), was based on the premise of collecting empirical data in order to revise the visual acuity standard. This was the announced purpose of the program and the basis for data collection methodology. The Vision Waiver Program was not conceived or designed to serve any other legitimate scientific purpose. Since the program was subsequently discontinued by court order, and since the agency has acknowledged that the data collected is not sufficient to revise the existing standard, there is no appropriate use to which the data can properly be applied, including as a basis for justifying the grant of vision exemptions. *Advocates* does not accept, and neither FHWA nor OMCS has proven, that data collected about drivers who voluntarily participated in the Vision Waiver Program can be used as the basis for granting exemptions (waivers) to drivers who did not participate in that program. There is no credible basis for making such an extrapolation, particularly when the FMCSA claims it is making individual assessments of each

applicant. The Supreme Court's discussion in *Albertsons* supports Advocates' view that the agency cannot fairly and credibly rely on data collected in the discredited Vision Waiver Program. The Supreme Court was eloquent in its conclusion that vision waivers are not a credible substitute for the underlying standard. Since the data collected in the program cannot be used for its intended purpose to revising the vision standard, it cannot and must not be used for any other legal, regulatory, or policy purpose, including the justification for issuing exemptions from the vision standard.

In previous notices regarding the Vision Waiver Program and vision exemptions, FHWA persistently invoked the Americans with Disabilities Act (ADA) as the rationale for the Vision Waiver Program and the subsequent issuance of vision waivers, now referred to as exemptions. During the Vision Waiver Program litigation in federal court, and even after the Court of Appeals nullified that program, the FHWA steadfastly maintained that the issuance of vision waivers was required in order to comply with the ADA. Advocates has long contended that the ADA does not override existing safety standards contained in the FMCSRs, and that the issuance of waivers is not a viable means of addressing requirements in the vision standard and other medical and physical qualifications for commercial drivers that are purported to be overly stringent. We were gratified to read that OMCS admitted that the ADA "does not apply to the Federal regulations." 64 Fed. Reg. 66965; *see also* 64 Fed. Reg. 66965. Thus, the OMCS at least agreed that the vision waiver program and other programs of its kind, including waivers and exemptions, are not statutorily required by the ADA. This admission should lead the agency to reevaluate its position under the lower court decision in *Rauenhorst v. U.S. DOT, FHWA*, 95 F. 3d 715 (1996). That decision, which predates the U.S. Supreme Court opinion in *Albertsons*, was predicated on the assumption that the ADA applied to federal safety and medical qualification standards. Since the OMCS admitted that this is not the case, and in light of the Supreme Court decision more narrowly interpreting the ADA, the FMCSA should reassess its policy of granting numerous exemptions to the vision standard.

While it may be technically correct that the decision in *Albertsons* does not "*directly* affect the exemption program," 64 Fed. Reg. 66965 (emphasis added), it is very clear that from a factual standpoint the Court disdained the agency grant of waivers in such an arbitrary and capricious manner. Clearly, the Supreme Court did not place much credence in the waivers issued by FHWA since it determined that employers subject to the federal requirements were free to ignore the waivers and did not have to hire drivers who held waivers. The common sense impact of the Court's decision is equally applicable to exemptions issued by the FMCSA. Advocates has always maintained that the appropriate procedure is to revise the standards based on relevant and sufficient medical and safety information. In *Albertsons*, the Supreme Court unanimously agreed with this position.

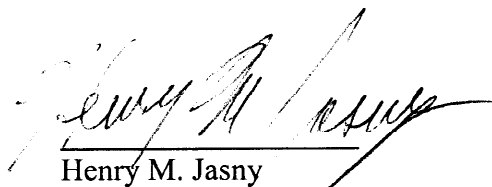
In reaching its decision, the Supreme Court discussed the legislative history of the ADA. As Advocates had previously contended, the Court concluded that "[w]hen Congress, enacted the ADA, it recognized that federal safety rules would limit application of the ADA as a matter of law." *Albertsons, slip op.* at 18. The Court cited the understanding of Congress that "a

person with a disability applying for or currently holding a job subject to [DOT standards for drivers] must be able to satisfy these physical qualification standards in order to be considered a qualified individual with a disability under Title I of the legislation.’ S. Rep. No. 101-116, pp. 27-28 (1998) [sic].” *Id.* The relevant Congressional committees did request that the Secretary of Transportation conduct a thorough review of knowledge about disabilities and make required changes within 2 years of enactment of the ADA. While FHWA and OMC failed to conduct such a review of the FMCSRs and medical qualifications in general, a subsequent review of the vision standard by FHWA found no empirical evidence on which to base any change in that standard. Thus, the waiver program did not fulfill the Congressional request to make necessary changes to the standards following a review because “the regulations establishing the vision waiver program did not modify the general visual acuity standards.” *Albertsons, slip op.* at 18. It cannot be contended that Congress, in enacting the ADA, sought to undermine existing safety standards on an *ad hoc* basis by permitting the employment of persons who do not meet the extant safety requirements mandated by the Department of Transportation. As a result, the Supreme Court concluded that it

is simply not credible that Congress enacted the ADA (before there was any waiver program) with the understanding that employers choosing to respect the Government’s sole substantive visual acuity regulation in the face of an experimental waiver might be burdened with an obligation to defend the regulation’s application according to its own terms.

Id. at 22.

In light of the decision in *Albertsons*, the FMCSA must revisit the position previously taken by both FHWA and OMCS, re-evaluate the significance of the lower court decision in *Rauenhorst v. U.S. DOT*, and reconsider the agency’s policy of issuing experimental vision exemptions based on surrogate criteria for visual performance requirements.



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